

August 1, 2016

**Law 580: Torts
Section 2
Jessica Litman**

Assignment for August 29, 31, & September 1

Problem Set

This is a problem set for class discussion. The stories in these problems are based, in some cases only loosely, on actual events. Most of them are drawn from real cases and news reports. I have used a couple of the fact patterns reflected in the problems as examination questions in past years, and they are good examples of the sorts of fact patterns you will be asked to analyze on the final exam.

Tort law is a particularly fact-bound area of the law. No legal rules operate in a vacuum, but the details of what actually happened are especially crucial in tort cases. I'd like you to ignore, for the purposes of these discussions, both your knowledge and your surmise about actual legal rules that might apply to these facts. Instead of trying to figure out what the law probably is, try to focus on what your intuition and sense of justice tells you that the rules *ought to be*. Should anyone in these stories be entitled to legal recourse from anyone else? Why? How should we define the standard so that we can recognize when someone has been harmed, and by whom? Are there particular injuries that ought not to be redressable by legal means? Should legal recourse in the particular circumstances be limited to situations where some actor has behaved wrongfully, or is there a different standard that might be more appropriate? Consider the details of what happened carefully: Is a particular action or event important to your decision about what rule you think should be applied? If the details were different, would a different rule be appropriate? Why? Would such a rule make sense? Discussions may veer into controversial territory. Please try to be respectful of your classmates' views.

We will spend the first week of class discussing these problems, and will return to them throughout the semester, using them for illustrations and in-class exercises. You may also find the problems useful aids for analyzing and reviewing different legal doctrines as we go through them.

I.

Ashley, a high school freshman, held a party for a dozen classmates at her house. Ashley invited Harry to the party, but she did not invite Calvin. Calvin showed up at the party anyway. Harry knew that Calvin wasn't invited, and when he saw him come in, he walked over to where Calvin was standing. Calvin believed that Harry was about to attack him, so he punched Harry in order to protect himself. Harry punched Calvin back, and the fight escalated from there. Ashley's mother, Celesta, saw the fight and was worried that the boys would hurt each other. She yelled at the boys to stop, but they didn't stop. Celesta then tried to intervene by stepping between the boys and trying to block them from punching each other. Harry punched her in the face and Calvin punched her in the back of the head. Celesta suffered a concussion and a broken nose. Both boys admit that they were trying to punch each other, but claim that they didn't realize that Celesta had gotten between them.

II.

Allen's house was destroyed by a fire. The fire started when a squirrel climbed onto the power company's transformer and caused a short circuit by touching a nearby wire with its tail. This caused a spark, which ignited the power line. It burned and dropped to the ground, dripping molten metal, which caused a grass fire. The grass fire spread across a vacant lot to Allen's home and burned his home to the ground.

Power companies in rural areas know that wildlife can interfere with electrical service and cause power outages and accidents. The industry has developed "critter guard" devices to shield equipment from animal interference. The electricity in Allen's municipality is supplied by the Power Power & Gas company. Power Power has adopted a policy of installing critter guards on any transformer that has had a past wildlife-related outage. Because there had been no wildlife-related incident involving the transformer near Allen's home, Power Power had not installed a critter guard at that location.

III.

Martha has terrible back pain. Her doctor prescribed a magnetic resonance imaging (MRI) procedure to help diagnose the reason for Martha's pain. Because Martha's discomfort is so severe, she is unable to lie still in the MRI machine for long enough to complete the image, so the doctor ordered medication for Martha that would enable her to lie still. The MRI was performed by Good Pics Medical Imaging (GPMI). On the day of her procedure, Martha spoke by telephone with Gary, the nurse at GPMI, and told him that she would be willing to take either morphine or Demerol, but would accept no other drug. Gary assured her that she would receive either morphine or Demerol. When she arrived at GPMI, Martha again asked the nurse what drug she would be given. Gary explained that she would receive fentanyl, a synthetic drug

similar to morphine or demerol. Martha refused to be given fentanyl. She insisted that she did not want to receive anything but demerol or morphine. She repeated this request three separate times and asked Gary to call her doctor to discuss the medication or reschedule the MRI. Martha finally agreed to proceed when Gary told her the medication had been changed to morphine. Actually, Gary administered fentanyl. Martha had an allergic reaction to the fentanyl, which caused breathing difficulties, a severe headache, and projectile vomiting.

IV.

It was 3:00 a.m., and Sonya was in the mood for a Taco Bell Doritos Cheesy Gordita Crunch. The local Taco Bell closed its indoor restaurant at midnight, but kept its drive-through window open every night until 4:00 am. Sonya had been drinking, and her blood alcohol level was over the legal limit. Nonetheless, she drove her car to the local Taco Bell and pulled up in the line for the drive-through window. Sonya noticed that the people in the car in front of her seemed to be taking a very long time placing their order. After 10 minutes, Sonya honked her horn. After 15 minutes, both the driver and the passenger of the car got out of the car, so that they could switch seats. Sonya yelled at them out her window, "Can we get moving? I'm hungry!" Romeko, the driver of the car, walked back to Sonya's car and stuck his head in her window, right next to her face. He said, "you got a fucking problem?" Sonya punched him in the nose. Romeko pulled a gun out of his pocket and shot Sonya. Sonya was severely injured, but ultimately survived the shooting. Romeko was killed the following week in an unrelated episode of gun violence. The Taco Bell has a security guard on duty every evening, but the guard's shift ends at midnight, when the indoor restaurant closes its doors.

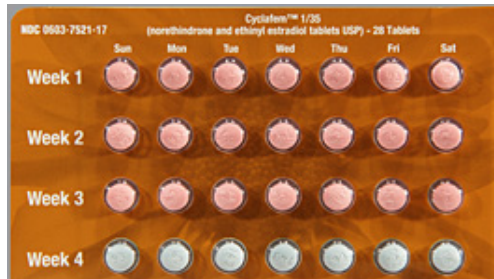
V.

In August, Joel's 2009 Honda CRV collided with a Scion sedan that had stopped abruptly at a red light. Joel had been driving 25 mph, well under the speed limit, and he was wearing a seatbelt. The driver of the Scion was not hurt, and neither car was badly damaged. The collision caused Joel's driver's side airbag to deploy. Joel's airbag, manufactured by the Takata corporation, had a defective airbag inflator, which ruptured and spewed shrapnel, piercing and severing the carotid artery in Joel's neck. Joel died instantly. Until recently, 20% of the cars sold in the United States contained airbags manufactured by Takata. The dangerous defect in Takata's airbags was discovered several years ago, and has been blamed for a dozen deaths. (Investigators have uncovered evidence that executives at Takata may have been aware that some of its airbags had the defect as early as 2004, but concealed that information from car manufacturers and safety regulators until 2008.) The initial safety recall was modest, but it has expanded repeatedly and now includes millions of vehicles. As a result, car manufacturers have not been able to secure enough replacement airbags to fix all of the recalled vehicles. Honda had in fact announced a recall of Joel's CRV several months before the accident, but had not yet scheduled the repair because Honda dealers were still waiting to receive the necessary replacement parts from Honda's suppliers.

VI.

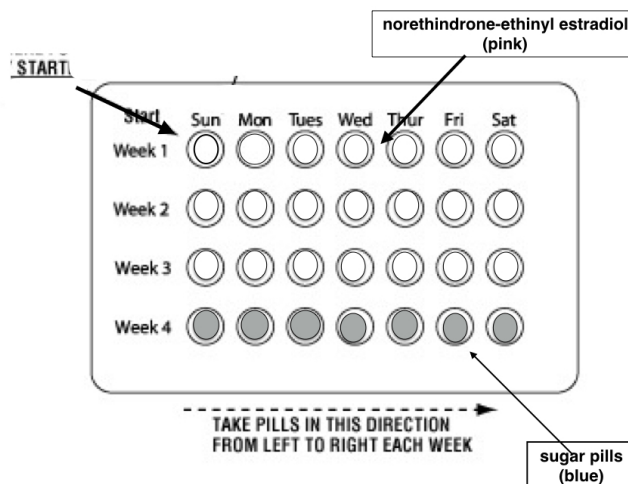
Cyclafem is a brand of oral contraceptive, or birth control pill, manufactured by Qualitest Pharmaceuticals. It is available only by prescription. About 20 of 100 sexually active women in their 20s who use no birth control will become pregnant in any given month. Cyclafem and similar drugs are 91% effective in preventing pregnancy, and have been shown to be 98% effective under laboratory conditions when patients consistently take the pills exactly as directed.

Qualitest distributes Cyclafem in 28-pill blister packs.

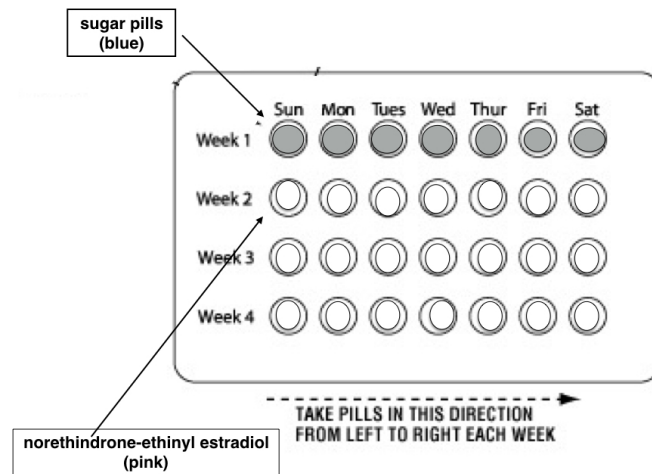


The first 21 pills in the blister pack contain norethindrone-ethinyl estradiol, a combination of progesterone and estrogen. The final seven pills are sugar pills. To assist patients in telling the two sorts of pills apart, Qualitest colors the norethindrone-ethinyl estradiol pills pink and the sugar pills blue.

Only the norethindrone-ethinyl estradiol pills contain any pregnancy preventative. The 7 blue sugar pills are included in the blister pack to make it easier for patients to take a pill every day, at the same time each day. A woman who has been prescribed Cyclafem is instructed to take the first pill on the first day of her menstrual period, and to take a pill at the same time every day until she has taken all 21 pink pills, then to take a blue pill every day for 7 days, until she has taken all 28 pills in the blister pack. On the 29th day, she begins a new blister pack.



In 2013, Qualitest discovered that some packages of Cyclofem had the blister pack rotated 180 degrees, so that the blue pills appeared in the top row for Week 1, and the pink pills filled the three bottom rows for weeks 2, 3 and 4:



The company initiated a voluntary nationwide recall of all Cyclofem blister packs, and released a statement urging patients who might have taken the affected pills to use a backup method of birth control. By that time, however, an unknown number of women had received the affected packages and had already taken all 28 pills in that cycle's blister packs. A woman who took the seven blue sugar pills at the beginning of her menstrual cycle and then took the 21 pink norethindrone-ethinyl estradiol pills for the balance of her cycle would have been unprotected against pregnancy during the most fertile days of that cycle.

Lauren took Cyclofem birth control pills, and the pharmacy from which she buys them was one of the pharmacies that received and sold defective blister packs. She is certain that she took the pills in that month's blister pack in the order they appeared, as she does every month. She doesn't remember whether she noticed that the pill colors were different. At the end of the month, she threw the empty blister pack away and started the next blister pack. Six weeks later, she discovered to her shock that she was pregnant.

VII.

Paul and Gregory were friends and roommates who worked at the AMB manufacturing plant from 1980 through 1995, making scientific instruments. In 1981, Paul began dating Brenda. After a few years, Brenda married Paul and moved into the apartment he shared with Gregory. In 1996, Paul started a new job with a different company, and Brenda and Paul moved out of the apartment into a house nearby. The AMB manufacturing process involved the use of beryllium, and exposed both Paul and Gregory to large amounts of beryllium dust. We now know

that beryllium dust exposure can cause serious, sometimes fatal, lung disease. AMB has adopted increased safety measures to reduce its workers beryllium exposure, but, like most companies that made use of beryllium, AMB had few such measures in place in the 1980s and 1990s. Brenda has recently been diagnosed with severe lung disease due to beryllium poisoning. She believes that she was exposed to beryllium dust carried home from work on Paul's and Gregory's clothing and shoes.

VIII.

Heart of Texas Hot Air Balloon Rides offers hour-long rides in a hot air balloon for \$399 per passenger. It specializes in wedding and engagement celebrations. Heart of Texas supplies the balloon, a licensed balloon pilot, transportation to and from the launch site, and some bottles of chilled champagne. It encourages passengers who wish to help the pilot steer the balloon in its flight. Early on a July Saturday morning, a hot air balloon operated by Heart of Texas and piloted by the company's owner, Skip, caught fire after hitting a high voltage electrical power line, and crashed into a pasture south of Austin. All 16 passengers were killed.

IX

Flora's Glorious Ice Cream is a brand of artisanal ice cream, sorbet, and frozen yogurt made in small batches from organic ingredients. Flora's ships its products nationwide and has a significant foodie following. Fans praise its smooth texture, creamy body, bright flavor, and clean finish. Darkest Chocolate, Salted Caramel and Black Currant are particularly popular flavors. This past April, a routine test by the state agriculture department revealed the presence of listeria bacteria in a random sample of Darkest Chocolate ice cream. Listeria is bacteria present in soil, water, cattle and chickens. It thrives under refrigeration but can be killed by heat pasteurization. Consumption of food contaminated with listeria can cause listeriosis, a serious infection that is particularly dangerous for pregnant women, elderly adults and immunocompromised individuals.

The State Agriculture Department notified Flora's, which immediately stopped production, commenced tests of all of its equipment and the ingredients, and initiated a voluntary nationwide recall of all Flora's products. Flora's urged customers to dispose of all Flora's products or return them to the store for a full refund. Stores removed all Flora's products from their shelves and posted signs prominently warning customers of the possible contamination. News media covered the recall extensively. The recall cost Flora's about \$3 million dollars in direct expenses and the cost of 360 tons of destroyed products, as well as a still unknown amount in forgone future sales to retailers and customers who have lost confidence in the brand. Flora's tested every container of every product before destroying it, and confirmed that the contamination was confined to a single batch of Darkest Chocolate. Flora's has since redesigned its production facility and instituted a rigorous process for testing every single batch of every product for contamination.

The week before the discovery of the listeria contamination, Sam bought 8 quarts of Flora's Glorious Dark Chocolate ice cream for a party he was planning for his brother's birthday,

and stored the quarts in his freezer. Although the local news media covered the recall, and the store posted prominent signs, Sam watched no television and did not return to the store, so he didn't find out about the recall. Two weeks later, Sam got fired from his job as a motorcycle mechanic. Depressed, he binged on ice cream, consuming three quarts of Flora's Glorious Darkest Chocolate within an hour. Unfortunately, the quarts came from the contaminated batch, and Sam suffered a serious listeriosis infection.

X.

On July 5, 2016, Alton Sterling died of multiple gunshot wounds to the chest and back. An anonymous caller had telephoned the Baton Rouge Police Department and said that a black man selling CDs was threatening him and brandishing a gun. Two white police officers responded to the call. Multiple bystanders recorded the event on their cellphones. The recordings reveal that the officers detained Sterling, tasered him, and then grabbed him and pinned him to the ground. One officer knelt on Sterling's chest and the other sat on his legs. Sterling struggled. One of the officers shouted "He's got a gun," and then, "If you fucking move, I swear to god." The other officer yelled, "he's going for the gun!" One of the officers pointed his gun at Sterling, and then three gunshots were heard, followed by three more. The officers retrieved a handgun from Sterling's pocket. The bystander videos do not show Sterling wielding the gun or threatening the officers.

XI.

Tony suffered from severe pulmonary sarcoidosis, a disease that causes inflammation of lung tissue, and had been placed on a waiting list for a lung transplant. A pair of donor lungs became available for transplant after the death of an automobile accident victim. Tony's doctor, Dr. Alberto, told Tony that the donated lung had belonged to a healthy, 18-year-old man. Tony consented to the surgery, and Dr. Alberto performed the transplant. Before transplanting the lungs, Dr. Alberto examined them, and saw no signs of damage or disease. In fact, the donor had been a 31-year old woman with a history of heavy smoking. Organ transplant patients must take immunosuppressive drugs to prevent rejection of the transplanted organ. Those drugs suppress the body's immune system response to cancer, and allow cancer to progress more swiftly. Within a few months of the transplant, Tony was diagnosed with lung cancer. He died shortly thereafter.

XII.

Flint, Michigan is a city in which poverty and crime have increased markedly. The pipes that deliver city water to residents and businesses were installed in the early 20th century, and many of them are made of lead. Until 1967, the Flint city water system delivered water from the

Flint River, which it treated in its own water treatment plant. In 1967, Flint switched its water source to water delivered by the City of Detroit. The Detroit water system pumps water from Lake Huron and the Detroit River, and treats it with chemicals to kill bacteria and prevent corrosion.

In response to Flint's financial crisis, the governor placed the city in financial receivership and appointed an emergency manager to respond to the crisis. Under state law, emergency managers have complete authority and control over municipal decisions.

In 2014, as a cost saving measure recommended by the emergency manager, the city of Flint terminated its water contract with Detroit and returned to using water from the Flint River, which it treated in its own plant. It did not include corrosion control chemicals in those treatments, because the state department of environmental quality advised it that corrosion control was not required to comply with the federal government's lead and copper rule. Flint residents began almost immediately to complain that the water was discolored, smelled bad, and tasted terrible. State and local officials wondered whether the Flint River water was safe, and discussed returning to the Detroit water system. The Flint emergency manager assured those officials that any water quality issues were temporary and that switching back to Detroit water would be too costly. General Motors announced that it would stop using Flint City water because the water was corroding its auto parts. The City responded that it had tested the water and found that it met all health and safety standards.

Later independent tests revealed that corrosion in the water pipes, combined with the absence of corrosion treatment at the Flint water treatment plant, led to dangerous levels of lead and legionella bacteria in Flint drinking water. The emergency manager and State government officials dismissed concerns and complaints by Flint citizens. As a result, thousands of children were exposed to toxic levels of lead in their drinking water over a period of more than a year, and bacteria contamination has been blamed for an outbreak of Legionnaire's disease that killed ten people.

An independent task force appointed by Michigan's Governor Snyder investigated, and concluded that the emergency manager and municipal, state, and federal officials all bore some blame for the disaster. Several individuals appear to have concealed evidence of contamination and altered water quality reports. Other officials ignored evidence of the contamination and failed to heed the complaints of citizens.